Mwongera & 2 others ((Suing as Chairman, Treasurer & Secretary of Karen Langata District Association)) v National Environment Management Authority (NEMA) & another; Taaleri Private Equity Funds (Interested Party) (Environment and Land Appeal 20 of 2019) [2024] KEELC 1655 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1655 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL 20 OF 2019

EO OBAGA, J

MARCH 20, 2024

BETWEEN

ERASTUS MWONGERA, MR EZEKIEL ANGWENYI & PROF ALBERT MUM ..... APPELLANT

(SUING AS CHAIRMAN, TREASURER & SECRETARY OF KAREN LANGATA DISTRICT ASSOCIATION)

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) .... 1ST RESPONDENT

CYTON INVESTMENTS MANAGEMENT LIMITED ..... 2ND RESPONDENT

AND

TAALERI PRIVATE EQUITY FUNDS ..... INTERESTED PARTY

(Being an appeal from the decision of the NATIONAL ENVIRONMENT TRIBUNAL, delivered on 8th March, 2019 in Tribunal Appeal No. NET/185 of 2016)

JUDGMENT

1. The Appellant filed a Memorandum of Appeal dated 5th April, 2019 against the decision of the National Environmental Tribunal delivered on 8th March, 2019 asking the court to:

    a. Allow the Appeal

    b. Set aside and cancel the EIA License No. NEMA/EIA/PSL/3176 dated 31st May, 2016.

c. An order directing the 2nd Respondent to carry out a comprehensive Environmental and Social Impact Assessment Study in compliance with all relevant laws and regulations taking into account the views of the Appellant and the immediate residents of Ololua Ridge Karen and any direction or order of the Tribunal.

d. An order directing the 2nd Respondent to remove all developments that have taken place during the pendency of the Tribunal and Appeal proceedings and to restore the project site to its original condition.

e. Any other order(s) that the court may deem appropriate including order(s) that will give effect to the constitutional and environmental principles of sustainable development and effective public participation.

f. Costs of this Appeal.

2. The Appellant listed the following grounds of Appeal:

i. The Hon. Tribunal erred in law by refusing to cancel the EIA License despite finding that the license was issued to an entity that did not apply for the license.

ii. The Hon. Tribunal erred in law by confirming the license despite the fact that the Respondents disregarded the express provisions of section 65 of the Environment Management and Coordination Act prescribing the process of transferring an EIA License.

iii. The Hon.Tribunal erred in law and fact by failing to find that and give effect to the applicable gazetted and physical planning and zoning laws as the baseline for assessing potential environmental impacts of the proposed projects.

iv. The Hon. Tribunal erred in fact and in law and fact by making a generalised finding that the EIA Study Report and License Conditions adequately addressed and mitigated against the negative environmental impacts without addressing itself to the specific negative environmental impacts highlighted by the Appellant and how and to what extent the purported mitigation measures and/or license conditions mitigated against them.

v. The Hon. Tribunal erred in law in failing to give effect to the precautionary principle as required by the Environmental Management and Coordination Act which is binding on the 1st Respondent in discharging its mandate and requires the 2nd Respondent not to proceed with a project in the absence of clear scientific evidence that the project will not cause environmental harm.

vi. The Hon. Tribunal erred in law in failing to appreciate that the 1st Respondent does not have statutory authority to defer performance of statutory duties required to protect the environment to future reviews and surveillance.

vii. The Hon. Tribunal erred in law by holding that the proponent can proceed with the project without an approved Traffic Management Plan despite finding the project has negative consequences relating to road access and traffic management.

viii. The Hon. Tribunal erred in law and in fact in failing to find that the Project proponent had misrepresented the scope and character of the project in the EIA Study.

ix. The Hon. Tribunal erred in law in failing to appreciate that the inconsistency between the components of the project described in the EIA Study and the License are of such magnitude

that the components that were not studied including the shopping centre and the four conference centres required separate and or more comprehensive EIA Study and licensing.

x. The Hon. Tribunal erred in fact and in law in failing to find that the residents, affected persons and neighbours were not provided with adequate, accurate and appropriate information regarding the project.

xi. The Hon. Tribunal erred in fact and in law by finding that the residents, affected persons and neighbours were sufficiently engaged in the public participation exercise without first determining the identity of the bona-fide residents, affected persons and neighbours of the project area or establishing a criteria for identifying them.

xii. The Hon. Tribunal erred in law in failing to find that the public participation of the EIA Study was inadequate despite finding that the process did not comply with the requirements of *the constitution* and the Environmental (Impact Assessment and Audit) Regulations.

xiii. The Hon. Tribunal erred in fact and in law in holding that the non-conforming public participation met the substance of the public participation required by the EMCA.

xiv. The Hon. Tribunal erred in law in confirming the EIA License dated 31/05/2016 and lifting the stop and conservatory orders.

Submissions;

3. The Appeal was canvassed by way of written submissions. The Appellant filed its submissions dated 27th January, 2021 where it was submitted that the EIA Study Report was submitted by Keith Howard Osmond and Valerie Mary Limb, not the 2nd Respondent and the license should thus have been issued to the two and not the 2nd Respondent. That the 2nd Respondent did not in fact allege to have submitted any EIA Study Report as required under Section 58(1) of the EMCA which in itself is an offence under Section 138(1) of EMCA, and not just a mere technicality; and that courts must ensure that the law is followed. Counsel relied on Githunguri Dairy Farmers Cooperative Society Limited vs County Council of Kiambu & Kenya Dairy Board (2015) eKLR. Counsel added that a decision made without complying with regulations couched in mandatory terms is flawed (Joyce Manyasi vs Evan Gicheru & 3 Others (2009) eKLR).

4. Counsel submitted that Regulation 7(1) of the Environmental Impact Assessment and Audit Regulations, 2003 requires that the project report states the nature of the project. However, Counsel pointed out that there were differences in the description and nature of the project between the Project Report and the EIA License, and specifically that the license has additional developments being 5 conference centres and a shopping centre. Counsel for the Appellant submitted that the 1st respondent thus erred in issuing a license that is inconsistent with the project report (New Muthaiga Residents Association vs Director General NEMA & Gemini Properties Limited (NET 24/2007). Consequently, under Regulation 28(b), the license ought to be cancelled.

5. Counsel further submitted that the project report identifies significant impacts of the development to the environment without proposing adequate mitigation measures. It is Counsel's case that there was no meaningful public participation as provided under Regulation 17(2). That the Tribunal in its judgment took cognizance of the lack of compliance with Regulation 17(2) which requires the proponent and NEMA to explain the project and its effects to the affected parties and receive their comments. Reliance was placed on Republic vs County Government of Kiambu Ex Parte Robert Gakuru & Another (2016) eKLR and Mohamed Ali Baadi & Others vs Attorney General & 11 Others (2018) eKLR.

6. Counsel further submitted that the project report acknowledges the Physical Planning Act as one of the applicable laws governing the project report. The License requires adherence to zoning specifications issued for the development of such a project within Nairobi County and the approved land use for the area. Counsel submitted that the Karengata Local Physical Development Plan prohibits such a development with an aim to preserving and enhancing the eco system around the Mbagathi zone and river and existing character and environmental quality of the area. For these reasons, Counsel urged the court to nullify the EIA License.

7. The 2nd Respondent filed its submissions dated 10th May, 2021. Counsel argued that issuing the EIA License to the 2nd Respondent instead of the registered owners who applied for it was a mere technicality. That there was never any doubt that the 2nd Respondent was the real proponent of the project (Sony Holdings Ltd vs Registrar of Trademarks & Another (2015) eKLR and R vs Soneji and Another (2005)4 All ER 321). Counsel also submitted that the variance in the description in the project in the project study report and the License is a typographical error and not a material defect warranting the court's interference (R (on the Application of Parkview Homes Limited) vs Chichester District Council & Another (2021) EWHC). Further, that the NEMA approvals were issued after full disclosure and based on the study report which adequately described the nature of the development and there is no evidence to prove otherwise. Counsel opined that the error could be cured through amendment of the License, as nullifying it would be disproportionate.

8. Counsel for the 2nd Respondent submitted that the 2nd Respondent satisfied the requirement for public participation under Regulation 17(2), thus the tribunal's finding on that issue was correct. That the Appellant never denied their participation in the public participation forums availed by the 2nd Respondent, only that their views were not taken into consideration. He relied on Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others vs County of Nairobi Government & 3 Others (2013) eKLR and Patrick Musimba vs National Land Commission & 4 Others (2016) eKLR among others.

9. Counsel also submitted that the Tribunal adequately assessed the negative impacts and mitigation measures set out in the EIA study report, upon which it determined that the project was environmentally sound. Further, that the Tribunal considered the precautionary principle. In addition, Counsel submitted that NEMA was empowered under Section 69(1) of EMCA to monitor the effects of any activities over land and thus can ensure compliance with the EIA License (Peter Bogonko vs National Environment Management Authority (2006) eKLR and Hosea Kiplagat & 6 Others vs National Environment Management Authority & 2 Others (2018) eKLR).

10. Counsel further submitted that the tribunal correctly held that it did not have jurisdiction over matters under the Physical Planning Act as those fell under the relevant Liaison Committees. (Jeremiah Nyandusi Abuga & 17 Others vs City Council of Nairobi (2013) eKLR, Jane Ngonyo Muhia vs Director General, National Environmental Management Authority & Another (2017) eKLR and Father Joseph Obanyi & Another vs Peter A Mugoya & Another (2021) eKLR). On costs, Counsel submitted that they follow the events and urged the court to dismiss the appeal with costs to the 2nd Respondent.

Analysis and Determination;

11. I have carefully considered the grounds of Appeal as well as the submissions by the parties. The Grounds of Appeal can be condensed to the following issues as set out and considered by the tribunal;

    i. Consequence of issuance of the EIA License to the 2nd Respondent rather than the project proponent per the EIA Study

ii. Whether the variance in the project description was sufficient to nullify the EIA license

iii. Whether there was legally proper and sufficient Public Participation prior to the issuance of the EIA License

iv. Whether the EIA Study Report and the License Conditions adequately address and mitigate against potential negative environmental impacts of the intended development

v. Whether the project contravenes the Physical Planning Act and the Zoning Policy of the Area.

vi. Who should bear the costs?

Background;

12. A brief background of this Appeal is that the Appellant was aggrieved by the 1st Respondents decision to grant the 2nd Respondent an Environmental Impact Assessment Licence No. NEMA/EIA/PSL/3176 (hereinafter referred to as "the EIA License") issued on 31st may, 2016. The EIA License was for the proposed construction of a comprehensive Development comprising 50 serviced villas, a nursery school, a clinic, 5 conference centres, shopping centre, a recreational centre, a clubhouse, a playground, associated facilities and amenities (hereinafter referred to as "the Intended Development"). This was to be carried out on L.R. Nos. 5954/2 and 5830/7 (amalgamated) along Ngong Road in Karen, Nairobi County (hereinafter "the suit property").

13. They filed a Notice of Appeal dated 25th July, 2016 at the National Environmental Tribunal (the Tribunal) which was later amended asking the Honourable Tribunal to:

a. NEMA's decision issuing the EIA License No. NEMA/EIA/PSL/3176 dated 31st May, 2016 be set aside and the license be cancelled.

b. An order be issued directing the 2nd Respondent to carry out a comprehensive Environmental and Social Impact Assessment Study in compliance with all relevant laws and regulations taking into account the views of the Appellant and the immediate residents of Ololua Ridge Karen and any direction or order of the Tribunal.

c. Any other order(s) that the Tribunal may deem appropriate including order(s) that will enhance the principle of sustainable development.

d. Costs of the suit.

14. The Appeal was determined by Judgment delivered by the Tribunal on 8th March, 2019 in which it dismissed the Appellant's Appeal directing each party to bear thrie costs, and further lifted all orders that were in effect at the time barring the implementation of the said project. Dissatisfied with the NET's decision, the Appellants moved to this court and filed a Memorandum of Appeal dated 5th April, 2019.

15. This is a first appeal. Accordingly, this court is under a duty to re-evaluate the evidence before the Tribunal and reach its own conclusions see Sele and another vs Associated Motor Boat Company Ltd & others (1968) EA 123 in which the court stated"

> "....this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way or retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence,

evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make allowance in this respect."

i. Consequence of issuance of the EIA License to the 2nd Respondent rather than the project proponent per the EIA Study;

16. The EIA project report was prepared by one Ms. Faith Mukunga, an EIA expert, in the names of one Keith Howard Osmond and Valerie Mary Limb as the project proponents. The Letter of Approval of the Terms of Reference for the EIA Study was issued to the said Keith Howard Osmond and Valerie Mary Limb. The explanation given for this by the 2nd Respondent's witnesses is that these two individuals were the registered owners of the land at the time of submission of the project report, and that due to time constraints, they used the names of the registered owners of the land as required by the regulations.

17. The Environmental (Impact Assessment and Audit) Regulations at Regulation 2 define "proponent" as the "person proposing or executing a project, programme or an undertaking specified..." and not necessarily the landowner. Being the people who applied for the EIA license, the said Keith Howard Osmond and Valerie Mary Limb. The 1st Respondent should have issued the EIA License to the project proponents named in the study report. This was not the case, instead, the EIA License was issued to Cytonn Investments Management Limited, the 2nd Respondent herein, an entity that had never applied for the License in the first place.

18. It is not clear therefore, what project this EIA License No. NEMA/EIA/PSL/3176 issued to the 2nd Respondent was in respect of. Seeing as the 2nd Respondent had never made a formal application for issuance of a license, the EIA License issued by the 1st Respondent to the 2nd Respondent for a was thus not valid and is thus void. Consequently, this court finds that the 2nd Respondent held no license capable of being transferred through Certificate of Transfer of EIA License No. NEMA/EIA/CTL/97 of 8th January, 2016 to Ololua Estates LLP.

19. In addition, any purported transfer of an EIA License where the project proponent might change and provides ought to have been done in compliance with the procedure laid out in the EMCA and regulations thereunder. Therefore, once the land had been transferred to the 2nd Respondent, then they, together with the previous registered owners of the land ought to have made an application for transfer of the license upon which the 1st Respondent could have transferred the license to the 2nd Respondent. Section 65 of the EMCA provides for Transfer of Environmental Impact Assessment Licence in the following words:-

> "(1) An environmental impact assessment licence may be transferred by the holder to another person only in respect of the project in relation to which such licence was issued.
>
> (2) Where an environmental impact assessment licence is transferred under this section, the person to whom it is transferred and the person transferring it shall jointly notify the Director-General in writing of the transfer, not later than thirty days after the transfer.
>
> (3) Where no joint notification of a transfer is given in accordance with subsection (2), the registered holder of the licence shall be deemed for the purposes of this Act to be the owner or the person having charge or management or control of the project as the case may be.

(4) Any transfer of an environmental impact assessment licence, under this section shall take effect on the date the Director-General is notified of the transfer.

(5) Any person who contravenes any provisions of this section, shall be guilty of an offence."

20. On the procedure for transfer of an EIA licence, regulation 26 provides that:

"(1) The holder of an environmental impact assessment licence may, on payment of the prescribed fee, transfer the licence to another person only in respect of the project to which such licence was issued.

(2) The transferee as well as the transferor of a licence under this Regulation shall be liable for all liabilities, and the observance of all obligations imposed by the transfer in respect of the licence transferred, but the transferor shall not be responsible for any future liabilities or any obligations so imposed with regard to the licence from the date the transfer is approved.

(3) Where an environmental impact assessment licence is to be transferred, the person to whom it is to be transferred and the person transferring it shall jointly notify the Director-General of the transfer in Form 11 set out in the First Schedule to these Regulations.

(4) The Authority shall issue a certificate of transfer of an environmental impact assessment licence in Form 12 set out in the First Schedule to these Regulations.

(5) Where no joint notification of a transfer is given in accordance with this Regulation, the registered holder of the licence shall be deemed for the purposes of these Regulations and the Act to be the owner or the person having charge, management or control of the project as the case may be."

21. However, in total violation of the laid down procedures, the 1st Respondent issued the License directly to the 2nd Respondent, who vide a Certificate of Transfer of the license from the 2nd Respondent to its affiliate, Ololua Estates LLP. This was done on the strength of a letter without any of the forms required herein being presented. Neither the 1st or 2nd Respondent produced the requisite Form 11 and/or Form 12 as set out at Regulation 26(3) and (4) above. Whereas regulation 26(3) requires both the transferor and transferee of the license to inform the Director-General of the intended transfer, the letters requesting the Transfer dated 20th May, 2016 and 30th May, 2016 were only written by the 2nd Respondent, the transferee herein.

22. And although it was claimed by the 1st Respondent's witnesses that two people appeared before them requesting that the license be issued in the name of the 2nd Respondent, there is no written record of who these people were or if at all they were the original project proponents. But even if they were the original project proponents, as stated above, there was no license capable of being transferred as the same was yet to be issued. The fact that the 1st Respondent admitted to this being the ordinary practice for NEMA to issue an EIA License in names of entities that had not applied for them cannot legalise an act done contrary to the law. The said witness further admitted that the practice is not based on law or any regulations and it can only be termed as illegal and void.

23. That aside, the extract of the Project Report produced by the 1st Respondent indicates that it was signed by both Keith Howard Osmond and Valerie Mary Limb on 13th January, 2016. The EIA Study was only signed by one proponent, Keith Howard Osmond, on 29th March, 2016. This court has however seen a Death certificate indicating that the said Keith Howard Osmond died on 26th May, 2015 so it is not clear who signed the two documents. In any event, even it the personal representatives of his estate signed the documents, it should have been clear that they were signing as legal representatives but this was not indicated, and as matters stand, this reeks highly of impersonation.

ii. Whether the variance in the project description was sufficient to nullify the EIA license;

24. The Appellants also raised issue with the activities of the project as described by the 2nd Respondent as being different from the ones licensed. The EIA Study for the proposed project at its introduction (page 26 of the Record of Appeal) described the project in the following terms:-

> " The project proponents propose to develop 50 Serviced Villas, Nursery School, Clinic, a Conference Centre and a Recreational Centre which consists of 15 Cottages, a club and playgrounds..."

25. However, the EIA License No. NEMA/EIA/PSL/3176 as issued describes the project as

> " Construction of a comprehensive development comprising 50No. Serviced villas, a nursery school, a clinic, 5No. Conference centres, shopping centre, a recreational centre, a clubhouse, a playground, associated facilities and amenities."

26. The Appellants contention is that while the study report talks of one conference centre, the EIA License approved the construction of 5 conference centres as well as a shopping centre. That therefore, the development licensed by the 1st Respondent is different from the project description contained in the study report. The 2nd Respondent urged that the activities, impact and mitigation measures under Licence No. NEMA/EIA/PSL/3176 had not changed and therefore a fresh EIA study report was not required.

27. I must agree with the Appellant that there seems to be some confusion as to the exact description of the intended development even on the part of the 2nd Respondent itself. For instance, Faith Mukunga, the Lead EIA Expert who prepared both the Project report and the EIA Study Report in her witness statement stated that the development was to include a shopping centre and further that "the Development does not propose 5 conference centres as alleged". Martin Gitonga, who also testified for the 2nd Respondent in his testimony informed the tribunal that the 2nd Respondent after the filing of the Appeal had decided to downsize the shopping centre to a convenience store.

28. This is thus an admission that before the Appeal was filed at the Tribunal, there was an intention to put up a shopping centre as indicated in the license. Later on in his testimony, he acknowledged that in the layout and approved architectural designs, the site layout exhibits an area for "shops" and "meeting rooms" and not a convenience store as earlier explained. The words "shops" and "meeting rooms" have a plural connotation, meaning that it was not just one convenience store, or just one meeting room. Additionally, the building permission granted by the county only approved the construction of 10 cottages, yet the EIA Study Report talks of 15 cottages.

29. The Tribunal's findings on this issue was that:

> "The Tribunal has examined the overall site layout which was part of the approved architectural designs and masterplan for the proposed project and we observe that the site layout exhibits a solitary clubhouse, a solitary community centre, 10 cottages adjacent in close proximity to the community centre and a further 5 cottages near the clubhouse, fifty villas and a day care centre. Within the community centre design we observed a number of spaces set aside for shops, and an area referred to as business centre, segmented in the detailed designed into five separate spaces as such. We also observed that the clubhouse features spaces designated as meeting rooms."

30. The Tribunal however found that the inconsistency between the description at condition 1.1 of the license and the description in the EIA Study Report was one that could be easily resolved by the tribunal should the project be allowed to proceed. Further, that the inconsistencies are not of a nature that would render the EIA Study Report unsatisfactory solely on that ground or compromise the License issued by the 1st Respondent.

31. It goes without saying that the project as described in the Study Report differed from what was licensed in the EIA License. The EIA License introduced new aspects that had not been raised in the Report. It follows therefore that, since new aspects were added to the intended development, the nature of the development as explained to the residents and neighbours as affected persons was manifestly different and affected persons should be have been allowed to comment on the final document. The argument that the variations were typographical errors do not hold, if this was the case the 1st Respondent would have sought to have the license rectified or otherwise amended as suggested before the outcome of the Appeal at the Tribunal, they did not do so.

32. The many variations of the intended development as between the description in the EIA Study Report, the EIA License and even in the Development permissions granted by the Nairobi City County point to the possibility that the Respondents intended to illegally insert into the intended development aspects not disclosed to the Appellant, its members and other affected individuals. Coincidentally, even though the Tribunal indicated that it was in a position to resolve the discrepancies should the project be allowed to proceed, it did not sufficiently do so. Consequently, the EIA license cannot be said to have been issued on the basis of the EIA study report or at all, and thus it cannot stand.

iii. Whether there was legally proper and sufficient Public Participation prior to the issuance of the EIA License;

33. Grounds 10, 11, 12, 13 and 14 of the Memorandum of Appeal deals with the issue of public participation. According to the Appellant, the residents were not provided with adequate and appropriate information about the project; bona fide residents and neighbours were not sufficiently engaged in public participation as there was no criteria for identifying them; the public participation was not inadequate and did not comply with the Regulations, a fact that the Tribunal noted, and thus did not meet the requirements of EMCA.

34. Regulation 17 of the Environmental (Impact Assessment and Audit) Regulations 2003, requires the proponent of a project to seek views of the persons to be affected after approval of the project report and during the process of the study. In particular, Regulation 17 (2) provides that:-

> "(2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall—

(a) publicize the project and its anticipated effects and benefits by—

(i) posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;

(ii) publishing a notice on the proposed project for two successive weeks in a newspaper that has a nationwide circulation; and

(iii) making an announcement of the notice in both official and local languages in a radio with a nationwide coverage for at least once a week for two consecutive weeks;

(b) hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;

(c) ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and

(d) ensure, in consultation with the Authority that a suitably qualified co-ordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority."

35. It is the 2nd Respondent's case that it held consultative meetings with the stakeholders as required under Regulation 17(2). From the documents submitted into this court, the first meeting was held in 1st December, 2015. From the copy of the presentation given to the residents at this meeting at page 505 - 512 of the Record of Appeal, it is clear that it was more of a marketing opportunity for the 2nd Respondent. It was not structured to share information on the possible effects and impacts of the project on the population and the proposed mitigation measures that the 2nd Respondent would undertake. If anything, it only informed the residents of investment opportunities that the 2nd Respondent provided and the benefits of the intended development from an investment angle.

36. However, Regulation 17(1) provides that "During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project". The Project Report is dated 13th January, 2016 and the EIA Study is dated March, 2016. Since this meeting of December, 2015 was held before the EIA Study, it cannot count as a public participation forum in terms of Regulation 17(2).

37. The second consultative meeting was held on 5th March, 2016 and a list of the attendants was produced at page 170 of the Record of Appeal. Only two individuals are listed as residents, and the Chief ad Senior Chief. This cannot be held to have been a successful meeting as far as public participation is concerned. What is suspicious about this meeting is that none of the alleged residents appears in any of the follow up meetings after that, and do not appear in the petition signed by the Ololua Residents Association against the development. The same goes for the names of the people appearing in the

attached questionnaires, lending credence to the allegation that these people were not residents of the affected area.

38. The last meeting with stakeholders was held on 9th April, 2016. The Appellant's witness, Robyn Boyd in his Statement stated that the 2nd Respondent at this meeting took the residents through its investments and residential developments it had undertaken and their intention to put up a commercial residential development along Ololua Ridge, which claim the 2nd Respondent does not appear to have controverted. From the minutes of the said meeting produced by the 2nd Respondent, there is no indication that the 2nd Respondent took the residents through the anticipated negative environmental concerns that came with a project of the nature of the intended development.

39. Save for the introduction where the 2nd Respondent's representative indicated that the purpose of the meeting was "to work on modalities on how the development would be undertaken without compromising environmental concerns", it would appear that all issues relating to environmental concerns were raised by the residents. It is not very evident that the 2nd Respondent took the time to inform the attendants of the meeting of the negative effects of its intended project.

40. Public participation is a very important requirement, which is anchored in both *the constitution* and statutes. It is meant to ensure that the persons to be affected by a certain activity, in this case the intended development, are informed of the project and are afforded opportunity to comment on the same and there must be evidence of this. In the instant case, although there were consultative meetings held with the residents, it would appear that the said meetings were more of a marketing gimmick for the 2nd Respondents to sell the idea to the residents for investment purposes, and not to inform the residents of the impacts of the intended development.

41. The lack of information from the Respondents limited the ability of the Appellants and their members to question the viability of the Project. From the facts of this case, it would appear that even the later consultative meeting with the Residents, given it was arranged at the Resident's insistence, was undertaken to placate them and not intended to be an objective and genuine engagement. The Honourable Tribunal was correct in quoting Republic vs County Government of Kiambu ex parte Robert Gakuru & Another (2016) eKLR where Justice Odunga held that

> " Here I must say that public participation ought not to be equated with mere consultation. Whereas "consultation" is defined by Black's Law Dictionary 9th Edn. at page 358 as "the act of asking the advice or opinion of someone", "participation" on the other hand is defined at page 1229 thereof as "the act of taking part in something, such as partnership..." Therefore public participation is not a mere cosmetic venture or a public relations exercise."

42. In addition, Regulation 17(2)(b) requires that the proponent of project hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments. As indicated above, since the meeting of 1st December, 2015 has been held to not be a public participation forum, then the 2nd Respondent only held two consultative meetings with the residents and neighbours being the affected people. In Mohamed Ali Baadi and others vs Attorney General & 11 others (2018) eKLR, the Court held that:-

> " We are bound to review the evidence and determine whether there was adequate notification, education and information, review and reaction and, finally, consultation, dialogue and interaction. The standard of ascertaining whether there is adequate public participation in environmental matters, in our view, is the reasonableness standard which must include compliance with prescribed statutory provisions as to public participation.

This means, for example, if you do not comply with the set statutory provisions, then per se there is no adequate public participation. And, the question is not one of substantial compliance with statutory provisions but one of compliance."

43. The laid down procedure on public participation requires 3 public meetings, however, this did not happen. Although the 2nd Respondent did undertake some form of engagement with the people affected by the project, the same did not conform with the laid down procedure on public participation. It did not meet the number of required public forums, and neither did it adequately inform the members of the anticipated effects of the project. The decision by the Honourable Tribunal noted that the Respondents were asking it to find that the non-conforming public participation had nonetheless been sufficient in substance since all the affected and neighbouring communities had been engaged. It went on to find that:

> " Public participation must be assessed on a case-to-case basis. There can be no rigid formula for it nor should the procedural requirements of public participation be allowed to trump its purpose... To our mind, invalidating the EIA License herein on the basis of procedural non-compliance in the number of public meetings when there is no doubt that the substance of the requirement had been met would be profoundly unjust, and an elevation of procedure and technicalities over substantive justice."

44. The Tribunal based their decision on expectations placed upon it by Article 159(2)(d) of *the Constitution*. I respectfully disagree. It has been held time and again that the rules of procedure are not mere platitudes or technicalities. They make the process of judicial adjudication and determination fair, just, certain and even-handed. In Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others (2013) eKLR states:

> " ...I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice.

45. The Supreme Court affirmed this position in the case of Zacharia Okoth Obado vs Edward Akong'o Oyugi & 2 Others (2014) eKLR. Consequently, having been non-compliant to begin with, the public participation cannot be deemed to have been sufficient in the circumstances. In any event, had it been sufficient, perhaps there would not have been such spirited objections to the intended development as has been seen in the instant case.

iv. Whether the EIA Study Report and the License Conditions adequately address and mitigate against potential negative environmental impacts of the intended development

46. The two main issues that have been raised by the appellant under this head are that the anticipated pressure on the water resources in the area; and that the road used to access the intended development cannot support the anticipated increased in traffic that will result from a development of this nature. The proposed mitigation measures in the Environmental Management Plan with regards to Traffic management is to:

    i. Provide adequate on-site parking

    ii. Construction vehicles shall be under strict instructions to minimize unnecessary trips

iii. Traffic speeds for construction vehicles coming to and fro the project site shall be restricted to 15mph

47. Under Condition 2.5 of the EIA License, the 2nd Respondent was required to design and implement a concise traffic management plan duly approved by the city engineer and other relevant authorities before commencement of the works. To this court's knowledge, there has been no approved traffic management plan put in place to mitigate the traffic problems identified by the study report.

48. On the issue of the access road, in its reply to the Amended Notice of Appeal, the 2nd Respondent urged that the road is 18m wide. However, in the letter produced in court dated 11th June, 2016 from the 2nd Respondent to the Nairobi City county, the 2nd Respondent admitted that the road was actually 5 metres wide. In the above-mentioned letter of 11th June, 2016 the 2nd Respondent sought approval from the County to expand the existing road. In response, the County indicated that the existing access road is a right of way through plots owned by other developers and the 18m wide road may not be available throughout the whole road to the suit property. The county advised on the need to invite the stakeholders to agree on the surrender of the rights of way before approval could be given. There is no evidence that the 2nd Respondent wrote back in response to this proposal by the county, or indeed that they have in any way committed to purchasing or acquiring land for purposes of expanding the road as promised to the residents at the meeting of 9th April, 2016. The anticipated traffic problems remain unmitigated to date.

49. Another negative impacts anticipated in the EIA Study Report is an increased pressure on existing infrastructure such as water supply. On the issue of water resources, the EIA Study report at paragraph 3-4.1 indicates that:

> " The property is served by a trunk water line from Nairobi City Water and Sewerage Company. The site borders Mbagathi River to the East and has a river frontage of 400m; there are currently 2 pump stations on site possibly used to supplement the water supply."

50. It is not clear what the two pump stations are for or where the water being pumped comes from, but seeing as the said pump stations appear to have been placed along the river frontage, it is reasonable to assume that the water is being pumped from the river. However this was denied by the Respondents and it was nevertheless not brought out clearly in evidence, thus it remains mere speculation.

51. In the Amended Notice of Appeal at paragraph 6.5, the Appellants alleged that the intended development would consume about 158.5m^3 daily, which is reiterated by the Expert Witness Statement of Michael Kariuki Thomas, a qualified Water Resource Professional, dated 23rd October, 2016. The 2nd Respondent did obtain authorisation from WARMA dated 23rd May, 2016 to dig a borehole from which it was allowed to abstract 20.0m^3 of water per day. However, the 2nd Respondent's Witness, Martin Gitonga, in his oral testimony admitted that there was a difference of 140m^3 between the 20m^3 to be abstracted from the borehole and the 160m^3 needed per day.

52. The finding of the tribunal on the ground water resources is that:

> " With regards to Ground Water Resources, the Tribunal is satisfied that the 2nd Respondent's proposed mixture of bowsers, borehole water abstraction, County Government water supply, water harvesting and recycling measures are adequate vis-à-vis the concerns of the Appellant. We also note the role of the Water Resources Management Authority in licensing

and regulating the use of the borehole is a continuous one, and concerns of the Appellant with regard to potential breach of the Authority's licensed quantities are conjecture."

53. Yet it is clear from the evidence that the issue of water supply was not adequately addressed. And as noted by Michael Kariuki, the expert witness, the EIA report failed to identify and analyse the potential negative impacts of drilling the borehole. At condition 3 of the WARMA authorisation, the 2nd Respondent was required to conduct an EIA Impact Assessment on the drilling of the borehole in accordance with Section 58 of EMCA. This was not done and the 2nd Respondent seems to rely on the EIA Impact Assessment conducted on the project as opposed to conducting a separate study on the drilling of the borehole. What remains as proposed additional water sources apart from the county government supply is water harvesting which relies on rainfall and recycling measures which depends on the available water supply. It goes without saying that these supplementary water resources are unpredictable and cannot on their own be said to be adequate for a development of the magnitude intended to be undertaken herein. Consequently, this court disagrees with the finding of the Tribunal on that front.

54. The residents as well as the Appellants herein raised substantial environmental concerns that needed serious consideration and mitigation on the part of the Respondents but the same were either not sufficiently considered or were totally ignored, contrary to the purpose of the spirit and purpose of public participation. Justice Odunga in Republic vs County Government of Kiambu went on to say that:-

> " This court agrees with the Honourable Tribunal that the mere fact that particular views have not been incorporated in the decision making does not invalidate such decision.
>
> In my view, whereas it is not to be expected that the legislature would be beholden to the public in a manner which enslaves it to the public, to contend that public views ought not to count at all in making a decision whether or not a draft bill ought to be enacted would be to negate the spirit of public participation as enshrined in *the Constitution*. In my view public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be true reflection of the public participation so that the end product bears the seal of approval by the public. In other words the end product ought to be owned by the public. This position was appreciated in Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) as hereunder:
>
> > 'If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy'."

55. This court agrees with the 2nd Respondent's position that the project will have far reaching effect with regards to offering employment as well as housing solutions to Kenyans, as well as the tax benefits arising therefrom. However, this court must also weigh its potential benefits with the public interest and the need for protection against potential harm to the environment through as well as the

foreseeable difficulties in terms of traffic congestion or the anticipated pressure on water resources, which the 2nd Respondent has not conclusively and adequately dealt with.

v. Whether the project contravenes the Physical Planning Act and the Zoning Policy of the Area.

56. On this issue of contravention of the zoning policy, the issue as framed by the Tribunal was: 'Is it within the jurisdiction of this Tribunal to determine, whether the project character and its nature contravenes the Physical Planning Act and the zoning of the area?'. The Tribunal then made the finding that:-

> " It is the finding of the Tribunal that the issue of the proposed project's character and nature is not one which raises environmental concerns for this Tribunal to determine. With regards to the Physical Planning and Zoning aspects of the Appellant's case, it is our finding that on the facts of this case the issues addressed as relating to Physical Planning and/or Zoning are not of a nature that would require the Tribunal's interrogation."

57. However, the Appeal did not seek to quash the development approvals and on the basis that they violate the *Physical and Land Use Planning Act* or at all. Instead, it is the Appellant's argument that the project itself violated the conditions attached to both the development permissions and the EIA License which clearly required compliance with the zoning policy of the area. Condition 2.16 of the License reads:

> " The proponents shall ensure that the development adheres to zoning specifications issued for the development of such a project within the jurisdiction of Nairobi City County Government with emphasis on the approved land use for the area."

58. The Appellant's objection before the Tribunal was that the intended development violates the zoning specifications as provided under the local physical development plan contrary to the conditions granted in the EIA License and the development permissions granted by the Nairobi City County. Clause 3.4.2 of the KLPDP provides that there shall be only one residential unit per 0.4 Hectares, being approximately 1 acre. The 2nd Respondents intended development as approved by the 1st Respondent thus blatantly contravenes the provisions of the KLPDP with regards to this minimum acreage requirements.

59. The 2nd Respondent argues that the Nairobi Integrated Urban Development Master Plan (NIUPLAN) supersedes the Karengata Local Physical Development Plan (KLPDP). The NIUPLAN is defined as the spatial broad framework which requires preparation of detailed local physical and land use plans. Part of its strategy is the need to formulate local physical and land use plans according to NIUPLAN, which move is meant to enhance coordinated urban development. To date, there has been no new LPDP prepared or approved for the Karen-Langata (Karengata) area.

60. This makes it imperative that the existing local plan, the KLPDP is to be strictly adhered to alongside the NIUPLAN and implemented to avoid creating a lacuna. The argument that the NIUPLAN supersedes the KLPDP cannot hold. Martin Gitonga on behalf of the 2nd Respondent conceded that the 50 Villas would be built on 10 Acres, which translates to 0.2 acres per unit; and the 15 cottages are all to be built on 0.6 acres. It thus goes without saying that the intended Development does indeed contravene the zoning specifications as set out in the KLPDP, and this is a direct violation of not only the building permissions but also the conditions set out in the EIA License.

vi. Who should bear the costs?

61. The final issue to consider is who should bear the costs of this Appeal. The applicable principles are that costs follow the event. However, the award of the costs is also at the discretion of the Court. As this is a matter which clearly raises public interest concerns, it is the court's view that the Tribunal's finding on costs was appropriate. Therefore, each party in this Appeal shall bear their own costs.

62. Consequently, this court shall allow the Appeal and proceed to:-

    a. Set aside and cancel the EIA License No. NEMA/EIA/PSL/3176 dated 31st May, 2016.

    b. Issue an order directing the 2nd Respondent to carry out a comprehensive Environmental and Social Impact Assessment Study in compliance with all relevant laws and regulations taking into account the views of the Appellant and the immediate residents of Ololua Ridge Karen.

    c. Issue an order directing the 2nd Respondent to remove all developments that have taken place during the pendency of the tribunal and Appeal proceedings and to restore the project site to its original condition.

    d. Each Party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 20TH DAY OF MARCH, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Mbaluto for 2nd Respondent.

Court Assistant -Laban

E. O. OBAGA

JUDGE

20TH MARCH, 2024